GRANTED

(4)

No. 01-1444

Supreme Court, U.S.
FILED
SEP 4 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1) Is a police officer liable for damages in a civil action under 42 U. S. C. § 1983 for taking a statement from a suspect in a manner considered "compelled" for the Fifth Amendment's self-incrimination privilege?

2) Is a police officer liable in such an action for taking a statement without complying with the prophylactic rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966)?

3) Is a police officer liable in such an action for taking a statement in a manner that would render it inadmissible in a criminal trial under the procedural due process line of cases?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 6

I

The Fifth Amendment's self-incrimination privilege is only a right to have evidence excluded, and therefore does not support a civil rights action 6

A. An exclusionary rule. 6

B. Policy and the privilege 9

II

Miranda's irrebuttable presumption does not support a civil remedy for Fifth Amendment violations 13

III

An interrogation contrary to the procedural due process voluntariness standard is not sufficient to support a civil rights action 19

A. Procedural due process and evidence 20

B. Due process and policy 23

C. Alternatives 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U. S. 279,
113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) 20, 25, 26

Baxter v. Palmigiano, 425 U. S. 308,
47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976) 7, 26

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682,
56 S. Ct. 461 (1936) 19

Brown v. Walker, 161 U. S. 591, 40 L. Ed. 2d 819,
16 S. Ct. 644 (1896) 7, 8, 19

Buckley v. Fitzsimmons, 919 F. 2d 1230 (CA7 1990) ... 27

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716,
60 S. Ct. 472 (1940) 21

Colorado v. Connelly, 479 U. S. 157,
93 L. Ed. 2d 473, 107 S. Ct. 515 (1986) 20, 21, 22

Cooper v. Dupnik, 963 F. 2d 1220
(CA9 1992) (en banc) 23

Cooper v. Dupnik, 924 F. 2d 1520 (CA9 1991) 23

County of Sacramento v. Lewis, 523 U. S. 833,
140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) 29

Culombe v. Connecticut, 367 U. S. 568,
6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961) 23

Daniels v. Williams, 474 U. S. 327, 88 L. Ed. 2d 662,
106 S. Ct. 662 (1986) 22

Dickerson v. United States, 530 U. S. 428,
147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) 18, 20

Duckworth v. Eagan, 492 U. S. 195,
106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989) 16

Duncan v. Nelson, 466 F. 2d 939 (CA7 1972) 9

Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378,
101 S. Ct. 1880 (1981) 14

Graham v. Connor, 490 U. S. 386, 104 L. Ed. 2d 443,
109 S. Ct. 1865 (1989) 29, 30

Harlow v. Fitzgerald, 457 U. S. 800, 73 L. Ed. 2d 396,
102 S. Ct. 2727 (1982) 25

Harris v. New York, 401 U. S. 222, 28 L. Ed. 2d 1,
91 S. Ct. 643 (1971) 15, 16

Haynes v. Washington, 373 U. S. 503, 10 L. Ed. 2d 513,
83 S. Ct. 1336 (1963) 21, 23, 26

Hyde v. United States, 225 U. S. 347, 56 L. Ed. 1114,
32 S. Ct. 793 (1912) 17

Imbler v. Pachtman, 424 U. S. 409, 47 L. Ed. 2d 128,
96 S. Ct. 984 (1976) 9

Kastigar v. United States, 406 U. S. 441, 32 L. Ed. 2d 212,
92 S. Ct. 1653 (1972) 7, 22

Lefkowitz v. Turley, 414 U. S. 70, 38 L. Ed. 2d 274,
94 S. Ct. 316 (1973) 7

Marbury v. Madison, 1 Cranch (5 U. S.) 137,
2 L. Ed. 60 (1803) 6

Martinez v. City of Oxnard, 270 F. 3d 852
(CA9 2001) 2, 3, 6, 9, 18

McNeil v. Wisconsin, 501 U. S. 171, 115 L. Ed. 2d 158,
111 S. Ct. 2204 (1991) 15, 23

Medina v. California, 505 U. S. 437, 120 L. Ed. 2d 353,
112 S. Ct. 2572 (1992) 21

Michigan v. Mosley, 423 U. S. 96, 46 L. Ed. 2d 313,
96 S. Ct. 321 (1975) 23

Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182,
94 S. Ct. 2357 (1974) 15, 21

Miller v. Fenton, 474 U. S. 104, 88 L. Ed. 2d 405,
106 S. Ct. 445 (1985) 20, 21, 25

Mincey v. Arizona, 437 U. S. 385, 57 L. Ed. 2d 290,
98 S. Ct. 2408 (1978) 20, 26

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) 2, 12, 13, 14, 15, 23

Moran v. Burbine, 475 U. S. 412, 89 L. Ed. 2d 410,
106 S. Ct. 1135 (1986) 14, 15

Murphy v. Waterfront Comm' n, 378 U. S. 52,
12 L. Ed. 2d 678, 84 S. Ct. 1594(1964) 10, 11

New York v. Quarles, 467 U. S. 649, 81 L. Ed. 2d 550,
104 S. Ct. 2626 (1984) 14

Nixon v. Fitzgerald, 457 U. S. 731, 73 L. Ed. 2d 349,
102 S. Ct. 2690 (1982) 6

Oregon v. Elstad, 470 U. S. 298, 84 L. Ed. 2d 222,
105 S. Ct. 1285 (1985) 14, 15, 16, 17

Oregon v. Hass, 420 U. S. 714, 43 L. Ed. 2d 570,
95 S. Ct. 1215 (1975) 15

People v. Shaw, 180 Ill. App. 3d 1091,
536 N. E. 2d 849 (1989) 25

Pierson v. Ray, 386 U. S. 547, 18 L. Ed. 2d 288,
87 S. Ct. 1213 (1967) 9

Pillsbury Co. v. Conboy, 459 U. S. 248, 74 L. Ed. 2d 430,
103 S. Ct. 608 (1983) 8

Rochin v. California, 342 U. S. 165, 96 L. Ed. 183,
72 S. Ct. 205 (1952) 19

Schneckloth v. Bustamonte, 412 U. S. 218,
36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) ... 12, 20, 23, 24

Spano v. New York, 360 U. S. 315, 3 L. Ed. 2d 1265,
79 S. Ct. 1202 (1959) 21

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067,
96 S. Ct. 3037 (1976) 25

United States v. Apfelbaum, 445 U. S. 115,
63 L. Ed. 2d 250, 100 S. Ct. 948 (1980) 8

United States v. Balsys, 524 U. S. 666,
141 L. Ed. 2d 575, 118 S. Ct. 2218 (1998) 7, 10, 11

United States v. Cobb, 905 F. 2d 784 (CA4 1990) 29

United States v. Lanier, 520 U. S. 259,
137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997) 28

United States v. Leon, 468 U. S. 897, 82 L. Ed. 2d 677,
104 S. Ct. 3405 (1984) 8

United States v. Verdugo-Urquidez, 494 U. S. 259,
108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) 8

Walters v. National Assn. of Radiation Survivors,
473 U. S. 305, 87 L. Ed. 2d 220,
105 S. Ct. 3180 (1985) 21, 22

Williams v. United States, 341 U. S. 97,
95 L. Ed. 774, 71 S. Ct. 576 (1951) 19, 28

Withrow v. Williams, 507 U. S. 680,
123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993) 17, 24, 25

Wyatt v. Cole, 504 U. S. 158, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992) 25

United States Constitution

U. S. Const., Amdt. 5 ..... 7, 26

United States Statute

18 U. S. C. § 242 28

18 U. S. C. § 3501 18

42 U. S. C. § 1983 ..... 3, 19, 27, 28

Treatises

2 W. LaFave, J. Israel, & N. King, Criminal Procedure (2d ed. 1999) 25

Miscellaneous

Bator & Vorenberg, Arrest, Detention, Interrogation, and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Colum. L. Rev. 62 (1966) ... 24

Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417 (1985) 15

Cassell & Hayman, Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*, 43 UCLA L. Rev. 840 (1996) 12, 13

Cassell, *Miranda*'s Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387 (1996) 13

Dershowitz & Ely, *Harris* v. *New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198 (1971) 8

H. Friendly, Benchmarks (1967) 15

Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671 (1968) 13

Gardner, Section 1983 Actions Under Miranda: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277 (1993) 12, 15, 29

Gardner, The Emerging Good Faith Exception to the *Miranda* Rule—A Critique, 35 Hastings L. J. 429 (1984) 17

Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417 (1994) 21, 29

Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907 (1989) 16

Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865 (1991) 24

Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99 24

IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt - and swift execution of punishment.

Interrogating suspects is an integral part of criminal investigation. A proper interrogation regime is essential to a system that seeks to punish the guilty, protect the innocent, and preserve the rights of all. Creating an elaborate system of civil

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

liability for interrogation that is contrary to the rules of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) or the subjective, difficult to define due process voluntariness standard is regulatory overkill. It would needlessly deter police from interrogating suspects, resulting in lost voluntary confessions and the unwarranted compensation of those who have suffered no real harm. This is contrary to the interests of justice and society that the CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On November 28, 1987, the plaintiff, Oliverio Martinez, was stopped and frisked by police officers Maria Peña and Andrew Salinas as the officers were investigating drug activity in Oxnard, California. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 854 (CA9 2001). Officer Salinas found a knife in Martinez's waistband during the frisk, and a struggle ensued. At one point during the struggle, Officer Salinas cried out " 'He's got my gun.' " *Ibid.* Officer Peña drew her weapon and fired on Martinez several times, severely injuring him. See *ibid.*

The patrol supervisor, Sergeant Ben Chavez, soon arrived at the scene. He rode in the ambulance with Martinez in order to get his version of what happened. See *ibid.* At the hospital, Sergeant Chavez started a taped interview with Martinez as emergency room personnel began treatment. See *ibid.* The interview lasted over 45 minutes, but the transcript of the recorded conversations totaled approximately 10 minutes. See *id.*, at 854-855. Medical staff asked Sergeant Chavez to leave the trauma room several times, but he returned and continued questioning. See *id.*, at 854. Most of Martinez's responses to the questioning were complaints about his physical condition, such as his pain or his inability to move his legs, or repeated requests for treatment. See *id.*, at 855. Martinez twice stated that he did not want to talk anymore. See *ibid.* During the interview, he "drifted in and out of consciousness." See *ibid.*

"Martinez's statements were not used against him in a criminal proceeding," *id.*, at 857, because he "was not charged with a crime as a result of the incident." See District Court Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication, Part III (Aug. 1, 2000), App. to Pet. for Cert. 16a.

Martinez filed suit under 42 U. S. C. § 1983, alleging that the defendants violated his constitutional rights "by stopping him without probable cause, using excessive force, and subjecting him to a coercive interrogation while he was receiving medical care." *Martinez*, 270 F. 3d, at 855. The District Court denied Sergeant Chavez's qualified immunity defense and "granted summary judgment for Martinez on his claim that Chavez violated his Fifth and Fourteenth Amendment rights by coercing statements from him during medical treatment." *Ibid.* (footnote omitted). Chavez brought an interlocutory appeal, claiming that he was entitled to qualified immunity. *Ibid.* The Ninth Circuit denied the appeal, holding that the questioning violated Martinez's Fifth Amendment rights, "[e]ven though Martinez's statements were not used against him in a criminal proceeding . . . ." *Id.*, at 857. The Ninth Circuit also held that the interrogation violated the due process proscription against coerced confessions, and that for this right the " 'violation is complete with the coercive behavior itself . . . .' " *Ibid.* (quoting *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1244-1245 (CA9 1992) (en banc)). It concluded that "[i]n light of the extreme circumstances of this case, a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments," and it affirmed the District Court decision to deny qualified immunity. See *id.*, at 859.

SUMMARY OF ARGUMENT

The Fifth Amendment self-incrimination privilege does not support a civil rights action. By its own terms it is an exclusionary rule that is only violated by the admission of compelled incriminating testimony. Because the violation is not complete until self-incriminating statements are improperly admitted, the Fifth Amendment cannot be violated during interrogation. As the immunity cases demonstrate, the Fifth Amendment does not create a right to be free from questioning under compulsion, but only a right to be free from compelled self-incrimination.

The policy behind the privilege is stated in the Fifth Amendment, keeping the government from forcing individuals to furnish evidence that can prove their guilt. This is satisfied by its exclusionary rule. Other policies, such as privacy, evidentiary reliability, and the accusatorial nature of our system do not justify expanding the privilege to include a civil remedy. The exclusionary rule is not just a remedy here, it is an integral part of the Fifth Amendment. Welding a civil cause of action onto the privilege will needlessly deter proper police interrogation of suspects.

The *Miranda* rule does not change the analysis. *Miranda* created an irrebuttable presumption; confessions taken contrary to its procedures are deemed compelled without regard to whether they were in fact compelled. This rule did not create any new remedies, but is a rule of evidence given constitutional force through the Fifth Amendment. Like the Fifth Amendment it serves, a *Miranda* violation is incomplete without the improper admission of a confession taken contrary to its rules. Therefore interrogation contrary to *Miranda* without improper incrimination rules does not violate the Constitution and thus cannot support civil liability. Any doubts that *Miranda* cannot be violated during interrogation is dispelled by the numerous exceptions to the rule. Because the *Miranda* rule excludes both compelled and voluntary confessions, adding a civil remedy

will needlessly compound the already high cost of *Miranda* in lost voluntary confessions.

The fact that this Court recently clarified that *Miranda* is a constitutional rule changes nothing. *Dickerson* v. *United States* kept the status quo by leaving *Miranda* and its exceptions intact. Because the exclusionary rule is inseparable from *Miranda*, *Miranda* cannot support a civil rights action.

While due process can support a civil rights action for improper interrogation, the due process voluntariness standard is not a source of civil liability. The cases prohibiting involuntary or coerced confessions deal with the exclusion of evidence and fundamental fairness, concepts associated with procedural due process. The process due is no more than a trial free from an involuntary confession. Like the Fifth Amendment, this procedural due process right is only violated by the admission of an involuntary confession. Therefore, it does not support a civil rights action.

There are also strong practical reasons for avoiding civil liability. The voluntariness standard has proven notoriously difficult to implement. Overbearing the will is not easily defined, and the test is necessarily subjective. As the inducement cases demonstrate, a confession can be deemed involuntary with little real coercive interrogation. Civil liability should not be based on such a weak standard.

Substantive due process provides the standard for assessing civil liability for interrogation. Unlike procedural due process, the substantive due process violation is complete with the improper interrogation. Under this standard, civil liability should be limited to interrogation involving force, the deprivation of food, water, or sleep, or threats of force or deprivation. Such techniques are never proper, and can be said to "shock the conscience" of the court. They are also objective and easily defined. This distinction between violent interrogation and merely involuntary confessions has received some implicit recognition from this Court. It is now time for explicit approval

by dismissing civil liability for the comparatively benign interrogation in this case.

ARGUMENT

This case is about the relationship between rights and remedies. While it is an old maxim that rights must have remedies, see, *e.g.*, *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 163 (1803), this does not "establish that the individual's protection must come in the form of a particular remedy." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 755, n. 37 (1982). In the Fifth Amendment's self-incrimination privilege, the remedy, excluding incriminating statements, is part of the right. Because a Fifth Amendment violation is not completed until incriminating statements are improperly admitted, exclusion is the sole remedy. The procedural due process right against the use of involuntary confession operates in the same way. Civil remedies for interrogation are limited to violations of substantive due process. This involves extreme behavior like torture, threats of violence, or the deprivation of food, water, or sleep. Because substantive due process was not violated in this case, there is no civil remedy for the interrogation.

I. The Fifth Amendment's self-incrimination privilege is only a right to have evidence excluded, and therefore does not support a civil rights action.

A. An Exclusionary Rule.

The Ninth Circuit's Fifth Amendment holding centers on the theory that a Fifth Amendment violation occurs at the moment of "compulsion" at the police station. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 856-857 (CA9 2001). This premise is fundamentally erroneous.

The Fifth Amendment's self-incrimination privilege is not a right to be free from compulsion, but rather from compelled

self-incrimination. The Fifth Amendment privilege is essentially an exclusionary rule. Although the legislative history of the Fifth Amendment adds little to our understanding of the privilege, see *United States* v. *Balsys*, 524 U. S. 666, 674, n. 5 (1998), the text demonstrates that the self-incrimination privilege centers on the use of evidence in the criminal trial. "No person . . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5. The privilege applies to attempts to compel in proceedings other than the criminal trial, see *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), but the scope of the privilege is still limited to actual incrimination. See *id.*, at 77.

Therefore, while compulsion is a necessary condition for a Fifth Amendment violation, it is not a sufficient condition for the self-incrimination privilege. If the threat of incrimination is eliminated, then the government can compel a witness to testify. See *Kastigar* v. *United States*, 406 U. S. 441, 448-449 (1972). Similarly, a prison disciplinary board may draw negative inferences from the prisoner's silence at the disciplinary hearing when that silence is not used in any criminal proceeding. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317-318 (1976). Where there is no threat of incrimination, the privilege is unnecessary.

The act of being interrogated can have adverse consequences other than self-incrimination, but this is irrelevant to the Fifth Amendment analysis. In *Brown* v. *Walker*, 161 U. S. 591 (1896), a grand jury witness invoked the privilege with regard to questions concerning crimes for which he could not be held liable. See *id.*, at 609. Justice Field's dissent contended, "The [Fifth] amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed may not lead to a criminal prosecution." *Id.*, at 631. This majority rejected that argument.

> "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him

of a criminal charge. If he secure himself legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good." *Id.*, at 605-606.

This is "black letter law . . . ." *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 273 (1983) (Blackmun, J., concurring in the judgment).

"[T]he privilege itself is *defined* in terms of the incriminating effect of truthful testimony . . . ." *United States* v. *Apfelbaum*, 445 U. S. 115, 134 (1980) (Blackmun, J., concurring in the judgment) (emphasis in original). It is only violated when evidence is improperly admitted at trial. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. [Citation.] Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial*." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) (emphasis added). Although dicta, the *Verdugo-Urquidez* statement is the correct rule of law.

The Fifth Amendment privilege "*is* an exclusionary rule—and a constitutionally created one." Dershowitz & Ely, *Harris* v. *New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198, 1214 (1971) (emphasis in original). Because the privilege is not violated until the improper admission of self-incriminating testimony, exclusion is the *only* proper means to enforce the Fifth Amendment. If there is no evidence to exclude or no criminal trial to exclude it from, then there is no violation of the privilege. In that event, there is nothing to "remedy." This differs from the Fourth Amendment's exclusionary rule. Fourth Amendment violations are complete before trial, at the time of the illegal search. See *Verdugo-Urquidez*, 494 U. S., at 264. The Fourth Amendment exclusionary rule is a judicially constructed remedy intended to deter police from violating that right. See *United States* v. *Leon*, 468 U. S. 897, 906 (1984). Exclusion of evidence is not

a remedy for past violations of the Fifth Amendment privilege; it *is* the right itself.

In addition to comporting with constitutional text and this Court's precedents, denying civil liability for Fifth Amendment violations is the fairer approach. While police officers may produce an inadmissable statement through improper interrogation, the confession cannot be unconstitutionally admitted without the acquiescence of the trial judge and the prosecutor. These actors, with far more expertise in Fifth Amendment admissibility issues, are absolutely immune from civil liability for the improper admission of evidence at trial. See *Imbler* v. *Pachtman*, 424 U. S. 409, 427-428 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U. S. 547, 554-555 (1967) (judges). Police officers would be left holding the bag although the more responsible actors are immune. Cf. *Duncan* v. *Nelson*, 466 F. 2d 939, 942 (CA7 1972) (police officers who coerced the confession were not the proximate cause of its admission because they could not foresee that the judge would admit it).

B. Policy and the Privilege.

The Ninth Circuit's decision that the Fifth Amendment self-incrimination privilege can be violated even though the suspect was never incriminated relies on Fifth Amendment policy. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 857 (CA9 2001). It followed Ninth Circuit precedent holding that one purpose of the Fifth Amendment "is to prevent coercive interrogation practices that are 'destructive of human dignity.' " *Ibid.* (quoting *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1239 (CA9 1992) (en banc) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 457 (1966)). This is an unwarranted extension of *Miranda*. Like the Fifth Amendment it serves, *Miranda* is a trial right. It does not support a civil remedy because it is inseparable from the exclusion of evidence. See part II, *infra*. The Ninth Circuit's holding is also an improper application of extraneous policy to the self-incrimination privilege. The only policy behind the privilege is found in its text, preventing self-incrimination at

trial. While a source of other Fifth Amendment policies exists, it has been diminished, and does not justify expanding the Fifth Amendment.

An often quoted statement of policy justifications for the Fifth Amendment privilege is found in a famous passage from *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964). That passage lists numerous policy justifications for the privilege, including rationales as diverse as a "sense of a fair play" and "respect for the inviolability of the human personality . . . ." See *id.*, at 55. This collection of policies does not justify expanding the Fifth Amendment beyond its exclusionary rule.

Murphy is a diminished precedent. Its examination of the historical treatment of the relationship between the threat of foreign prosecution and the self-incrimination privilege has been overruled. See *Balsys* v. *United States*, 524 U. S. 666, 687-688 (1999). *Balsys* also critically reexamined the *Murphy* policies. In *Balsys*, the Justice Department's Office of Special Investigations (OSI), "which was created to institute denaturalization and deportation proceedings against suspected Nazi war criminals," was investigating Balsys. See *id.*, at 670. The OSI asked Balsys about his wartime activities between 1940 and 1944, but he invoked the self-incrimination privilege, claiming a fear of prosecution in a foreign nation. *Id.*, at 669. This Court rejected that claim.

In addition to rejecting *Murphy*'s use of history to support Balsys' position, the *Balsys* Court also declined to rely on *Murphy*'s list of Fifth Amendment principles in order to expand the privilege. This Court established that "at its [the Fifth Amendment's] heart lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt." *Id.*, at 683. The policies and aspirations listed in *Murphy* did not justify expanding the privilege beyond that principle:

> "we think there would be sound reasons to stop short of resting an expansion of the Clause's scope on the highly general statements of policy expressed in . . . . *Murphy*. While its list does indeed catalog aspirations furthered by the Clause, its discussion does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope." *Id.*, at 691.

Of particular importance is how this Court dealt with one of the broadest of the *Murphy* policies, "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ." 378 U. S., at 55. If allowed to define the scope of the Fifth Amendment privilege, this principle "would necessarily seem to include protection against the Government's very intrusion through involuntary interrogation." *Balsys*, 524 U. S., at 691. Since " 'inviolability' is after all, an uncompromising term," then as with the Fourth Amendment, breaches would occur "at the moment of illicit intrusion, whatever use may or may not be made of their fruits." *Id.*, at 692. This Court refused to stretch the self-incrimination privilege beyond its traditional boundary. "The Fifth Amendment tradition, however, offers no such degree of protection." *Ibid.* The immunity cases demonstrated that the privilege allows testimony to be compelled so long as the compulsion is accompanied by an appropriate protection from incrimination. See *ibid.* Personal inviolability is simply inconsistent with Fifth Amendment practice and precedent. "Thus, what we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years." *Id.*, at 692-693 (footnote omitted). This conditional testimonial privacy is enforced through the exclusion of evidence, and not through civil liability. The Ninth Circuit's notion that the privilege can be violated without actual incrimination cannot be reconciled with *Balsys*.

Since many of the *Murphy* values are either too vague to be meaningful or restatements of the privilege, see Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1312 (1993), analyzing each of them is unnecessary. In addition to human dignity, two other values have been suggested as being central to the self-incrimination privilege—preserving evidentiary reliability and protecting the accusatorial nature of the system. See *ibid.* Neither supports expanding the Fifth Amendment beyond its exclusionary rule.

Evidentiary reliability is protected by the Fifth Amendment's exclusionary rule. The threat of civil liability adds nothing, particularly since the prosecutors that submit and the judges who admit the incriminating statements are immune from liability. See *supra*, at 9. Also, many police-initiated Fifth Amendment violations will not be unreliable. Police interrogation is subject to the Fifth Amendment through *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Miranda*'s presumption excludes both reliable and unreliable confessions, see *infra*, at 14, thus reducing the marginal benefit to reliability. Imposing civil liability for noncompliance with the *Miranda* procedures regardless of whether the confession obtained is reliable will add little or nothing to the reliability of evidence.

The accusatorial nature of our system does not change the fact that police interrogation is indispensable to it. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). Even more importantly, creating a civil remedy will not give any added protection to the accusatory system. The Fifth Amendment's exclusionary rule prevents the prosecution from taking any unfair advantage of a Fifth Amendment violation. Welding a civil remedy onto the Fifth Amendment serves no purpose other than to discourage interrogation.

It is important to place the cost of this over-deterrence in its proper context. A major consequence of the *Miranda* decision is a significant decrease in the frequency of confessions obtained by police. See, *e.g.*, Cassell & Hayman, Police

Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*, 43 UCLA L. Rev. 840, 917 (1996); Cassell, *Miranda*'s Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 416-418 (1996). Potential voluntary confessions were lost because police either scrupulously followed *Miranda* or even went beyond the *Miranda* requirements. See Cassell & Hayman, *supra*, at 920. Civil liability for Fifth Amendment violations compounds this cost by adding more over-deterrence to the system. *Miranda* already makes police stop short of the actual constitutional limit of permissible interrogation. Adding civil liability will move them even further away, allowing the guilty to go free, and innocent suspects to remain under suspicion. See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 680-681 (1968) ("A man in suspicious circumstance but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . .").

Balsys provides the best approach to defining the Fifth Amendment's scope. The privilege should remain grounded in its primary purpose, preventing the government from using compelled testimony to prove the suspect's guilt. A civil remedy adds nothing to this goal while harming society by unnecessarily deterring police interrogation of suspected criminals. As in *Balsys*, precedent, constitutional text, and practicality all argue against expanding the Fifth Amendment.

II. *Miranda*'s irrebuttable presumption does not support a civil remedy for Fifth Amendment violations.

Because the police are the only individuals likely to be held civilly liable for Fifth Amendment violations, see *supra*, at 9, *Miranda* v. *Arizona*, 384 U. S. 436 (1966) would be the source of any civil rights case for alleged Fifth Amendment violations. While that landmark decision dramatically expanded the Fifth Amendment's reach, it did not add any new remedies. *Miranda*

is a rule of evidence given constitutional force through the Fifth Amendment's self-incrimination privilege. The product of an interrogation that does not comport with *Miranda* and its permutations, see, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981), is presumed to be involuntary without regard to whether it was in fact involuntary. *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985). This rule of evidence should only be implemented by an exclusionary rule, and, like its Fifth Amendment source, it is only violated at trial by the improper admission of incriminating statements.

Although the 50-plus page opinion sprawls over a wide range of topics, in the end *Miranda* is simply an exclusionary rule. The Court summarizes its own holding as this: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U. S., at 444 (emphasis added).

Miranda is not a rule separating voluntary from involuntary confessions. Instead, it creates a conclusive presumption that confessions not taken in accordance with its dictates are deemed involuntary without regard to whether they are in fact involuntary. "A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." *Elstad*, 470 U. S., at 304, 307, n. 1 (emphasis in original). *Miranda*'s presumption reflects this Court's choice of the appropriate balance between the suspect's protection from interrogation and society's need to solve crimes. See, *e.g.*, *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests" (emphasis in original)); *New York* v. *Quarles*, 467 U. S. 649, 658 (1984). While the opinion declared that voluntary confessions were a "proper element in law enforcement," *Miranda*, 384 U. S., at 478, the *Miranda* Court chose to tilt the balance sharply in

favor of the criminal defendant. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). This balance executes this Court's policy concerning police interrogation under the Fifth Amendment.

Miranda and its subsequent decisions have noted the "inherently compelling pressures" of the interrogation room. See *Miranda*, 384 U. S., at 467; *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991); *Moran*, 475 U. S., at 420. But this does not change the fact that the *Miranda* rule is only a presumption. While there may be some inherent pressure in any custodial interrogation, it must not be too compelling since *Miranda* still allows waivers under these circumstances. See 384 U. S., at 535-536 (White, J., dissenting).

There are many instances in which a suspect can give an unwarned, but still voluntary custodial confession. In his *Miranda* dissent, Justice White constructed a hypothetical where an unwarned suspect in police custody may blurt out a confession after being asked a single question such as " 'Do you have anything to say?' " or 'Did you kill your wife?' " This confession, while voluntary in fact, is suppressed under *Miranda*. See *id.*, at 533-534 (White, J., dissenting). As Judge Henry Friendly noted, "the books are full of instances, of which the Court must have been well aware through petitions for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967); see also *id.*, at 273, and nn. 33-36 (listing examples). In many cases after *Miranda*, confessions have been found or conceded to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, 470 U. S., at 318; *Oregon* v. *Hass*, 420 U. S. 714, 723 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971).

The policy that ties *Miranda*'s many strands together is dissatisfaction with administering the voluntariness standard. See Gardner, Section 1983 Actions under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30

Am. Crim. L. Rev. 1277, 1281-1282 (1993). This explains *Miranda*'s focus on custody. A station house can be very difficult for judicial scrutiny to penetrate. The *Miranda* rule finesses the problems with custody by overprotecting the Fifth Amendment privilege. See *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring).

Like its Fifth Amendment source, *Miranda* advances its policies through the exclusionary rule. See *Elstad*, 470 U. S., at 306. *Miranda* is only violated when incriminating statements are improperly admitted at trial. Thus, "courts should not care whether or not *Miranda* is violated so long as no evidence obtained from the violation is introduced against the person from whom it was obtained. Similarly, no police officer should be subject to a law suit for obtaining a confession in violation of *Miranda*." Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907, 917 (1989).

The case for limiting *Miranda* violations to improperly admitted testimony is even stronger than it is for Fifth Amendment violations in general. While a confession contrary to the Fifth Amendment must involve some sort of improper compulsion, *Miranda* can and does exclude voluntary confessions. Assessing civil damages through *Miranda*'s burdensome presumption is thus both unnecessary and unfair because the rule sweeps more broadly than the Fifth Amendment.

Any doubt that *Miranda* is exclusively a trial right is dispelled by its exceptions. While confessions obtained contrary to the *Miranda* rules are excluded from the government's case-in-chief, such statements are admissible for impeachment purposes. See *Harris*, 401 U. S., at 226. Exclusion from the main case provided enough of a deterrent to police. See *id.*, at 225. If a *Miranda* "violation" occurred at the time of the interrogation, then the fruits of the violation should be inadmissible under any circumstances. How can an officer who does not follow *Miranda* be found to violate the Constitu-

tion and be held liable for damages if it is constitutionally permissible to admit the product of that same interrogation for impeachment? In this hypothetical case, while the defendant has been incriminated, albeit indirectly by impeaching evidence, the interrogating officer who obtained this evidence could be found personally liable to the defendant, even though an appellate court would not overturn the defendant's conviction.

This demonstrates that *Miranda* did not establish a right to avoid interrogation. A suspect who gives an unwarned but voluntary statement "has suffered no identifiable constitutional harm." *Elstad*, 470 U. S., at 307. The Fifth Amendment is not violated until the statement taken contrary to *Miranda* is improperly admitted into evidence. While it is common to refer to a suspect's "*Miranda* rights" and to the conduct of police as a "*Miranda* violation," these are misnomers. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde* v. *United States*, 225 U. S. 347, 391 (1912) (Holmes, J., dissenting). While they are usually harmless, such terms should not deflect the focus from *Miranda* as a trial right. As "*Miranda* safeguards 'a fundamental *trial* right,' " the Fifth Amendment self-incrimination privilege, *Withrow* v. *Williams*, 507 U. S. 680, 691 (1993) (quoting *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990)) (emphasis added in *Withrow*), "a simple failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment." *Elstad*, *supra*, at 306, n. 1. This exclusionary rule no more supports civil liability than the Fifth Amendment it serves.

Just like the Fifth Amendment it serves, the *Miranda* presumption does not create a right to be free from questioning. "The evil the *Miranda* Court meant to eliminate arises not from the privacy intrusion—the questioning of the suspect—but from the *use* of compelled statements against him. Such *use* is the gravamen of a violation of the fifth amendment privilege against self-incrimination." Gardner, The Emerging Good

Faith Exception to the *Miranda* Rule—A Critique, 35 Hastings L. J. 429, 451-452 (1984). The Ninth Circuit's arguments to the contrary, see *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 857 (CA9 2001), are simply incorrect.

The fact that this Court recently affirmed *Miranda*'s constitutional status in *Dickerson* v. *United States*, 530 U. S. 428 (2000), does not change the analysis. *Dickerson* struck down 18 U. S. C. § 3501, Congress' attempt to supplant *Miranda* with a totality of the circumstances test for voluntariness. The *Dickerson* Court noted that language in some cases implied that the *Miranda* rule was not a constitutional right. See *Dickerson*, *supra*, at 437-438. The doubts about *Miranda*'s constitutionality were resolved by the fact that this Court consistently applied the *Miranda* rule to the states. If *Miranda* was not a constitutional decision, then it could not be applied to state court convictions. See *id.*, at 438. Further proof of *Miranda*'s status was found in language from *Miranda* itself. See *id.*, at 440.

Dickerson illuminated the landscape rather than changed it. The presence of exceptions to *Miranda* did not negate its constitutional status, and therefore survived the *Dickerson* decision. "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable." *Id.*, at 441. Because *Miranda* was so embedded in police practice and our culture, "the principles of *stare decisis* weigh heavily against overruling it now." *Id.*, at 443. The fact that the *Miranda* presumption overprotects the Fifth Amendment was also left untouched. "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Id.*, at 444. *Dickerson* simply reaffirmed the status quo.

While *Miranda* extended the reach of the Fifth Amendment privilege into the interrogation room, it did not expand the scope of the right. The privilege against self-incrimination is

still a trial right and therefore is only enforced through its exclusionary rule. Certain extreme forms of interrogation can support an action under 42 U. S. C. § 1983, see *infra*, at 27-30, but they are not covered by the Fifth Amendment or the *Miranda* presumption or raised by the facts of this case.

III. An interrogation contrary to the procedural due process voluntariness standard is not sufficient to support a civil rights action.

Interrogations can produce constitutional torts that support an action under 42 U. S. C. § 1983. A brutal interrogation such as the one in the notorious case of *Brown* v. *Mississippi*, 297 U. S. 278, 281-282 (1936) would now produce both civil liability under § 1983 and criminal prosecution. See *Williams* v. *United States*, 341 U. S. 97, 101-102 (1951) (criminal prosecution). But the *Brown* decision itself only involved the exclusion of evidence, not civil liability. In *Brown*, this Court held that due process required the exclusion of a confession obtained through such methods. See 297 U. S., at 286. *Brown* and successive Supreme Court opinions have established that admitting an involuntary confession in a criminal trial violates due process. Like the self-incrimination privilege, this line of cases regulates the admissibility of evidence, and it is thus an aspect of procedural due process. While some interrogation methods that produce involuntary confessions will support a civil rights action, many will not. Procedural due process excludes the fruits of interrogations that involve far less coercion than in *Brown*. See *infra*, at 25-26.

The standard of the procedural due process line of cases was created for a different purpose and is not suited as the standard for civil liability. The proper scope of civil or criminal liability for interrogations is the standard of substantive due process. See *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Sergeant Chavez did not cross the line of a properly defined substantive due process standard, and he is entitled to qualified immunity.

A. Procedural Due Process and Evidence.

Analysis of the due process confession cases begins with an understanding of how this Court uses the term "coercion." Some form of official coercion is a prerequisite to invalidating a confession under due process. See *Colorado* v. *Connelly*, 479 U. S. 157, 164 (1986). However, the scope of what is considered "coercion" is now far greater than just force or the threat of force. The prohibition against "coerced" confessions now also regulates "more subtle forms of psychological persuasion . . . ." *Ibid.* The term "coercion," while constitutionally significant, is best seen as a label for "the crucial element of police overreaching." See *id.*, at 163. While the coercive conduct must be "substantial," see *id.*, at 164, it need not involve "gross abuses . . . ." *Mincey* v. *Arizona*, 437 U. S. 385, 401 (1978).

Coercion cannot be separated from the concept of voluntariness. While coercion is integral to any due process violation, the test for determining a confession's constitutionality under due process is a "voluntariness test." See *Dickerson* v. *United States*, 530 U. S. 428, 434 (2000). The two concepts are so closely related that "prior cases have used the terms 'coerced confession' and 'involuntary confession' interchangeably 'by way of convenient shorthand.' " *Arizona* v. *Fulminante*, 499 U. S. 279, 287, n. 3 (1991) (quoting *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960)). The voluntariness test "examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson*, *supra*, at 434 (quoting *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973)). The relevant inquiry includes "the totality of all surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, at 226. Therefore, when a court labels a confession as "involuntary" or "coerced" it is important to understand that this term is a label that describes a complex inquiry. See *Miller* v. *Fenton*, 474 U. S. 104, 116 (1985). Practices that are not particularly

"coercive" as that term is commonly understood, like inducements, can still render a confession involuntary by overcoming the suspect's will. See *supra*, at 25-26.

It is similarly important to understand how the due process clause regulates confessions. Like the self-incrimination privilege, the *Brown* line regulates confessions through the exclusion of involuntary confessions. Thus the due process question frequently is framed in the context of excluding evidence. See, *e.g.*, *Haynes* v. *Washington*, 373 U. S. 503, 504 (1963) (deciding "whether the *admission* of the petitioner's . . . confession *into evidence against him at trial* constituted a denial of due process of law" (emphasis added)); *Spano* v. *New York*, 360 U. S. 315, 315 (1959) (raising the issue of whether the defendant's "confession was properly admitted under the Fourteenth Amendment"). " 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' " *Connelly*, 479 U. S., at 167 (quoting *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)).

The prohibition against the use of involuntary or coerced confessions that has evolved since *Brown* is a form of procedural due process. See Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417, 465 (1994) ("Most, if not all, coerced confession cases are procedural due process cases"). An early due process confession case characterized the prohibition against the admission of involuntary confessions as a matter of procedural due process. See *Chambers* v. *Florida*, 309 U. S. 227, 237 (1940). Prohibiting the taking and subsequent use of involuntary confessions is a matter of fundamental fairness, see, *e.g.*, *Connelly*, 479 U. S., at 167; *Miller*, 474 U. S., at 110; *Michigan* v. *Tucker*, 417 U. S. 433, 441 (1974), which is a component of a procedural due process inquiry. See, *e.g.*, *Medina* v. *California*, 505 U. S. 437, 448 (1992); *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320 (1985).

The importance of fair procedures separates procedural from substantive due process. Substantive due process raises a standard "barring certain government actions regardless of the procedures used to implement them." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986); see also Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Connecticut Dept. of Public Safety* v. *Doe*, No. 01-1231, at 4-7. Since the voluntariness standard guarantees a fair procedure—a trial free from involuntary confessions—this guarantee should not be characterized as part of a substantive due process inquiry that looks beyond whether the action was implemented in a fair manner. Given its basis in the exclusion of evidence and fundamental fairness, the voluntary confession requirement is part of procedural due process.

Procedural due process only requires the state provide the procedure that is due, not any particular result. See *Walters*, 473 U. S., at 321. In criminal cases, this is a fair trial, see *Daniels*, 474 U. S., at 337 (Stevens, J., concurring), a trial with all the procedures required under due process. In the context of the voluntary confession requirement, that is a trial where an involuntary confession is not admitted against the defendant. Therefore, due process is not violated unless an involuntary confession is used to incriminate the defendant at trial.

Coercion alone will not support a procedural due process violation. As the immunity cases demonstrate, coercive interrogation is constitutional when the threat of self-incrimination is removed. See *Kástigar* v. *United States*, 406 U. S. 441, 448-449 (1972) (the government can compel testimony if the speaker is granted immunity). The threat of imprisonment for failing to answer the government's questions is much more coercive than the "more subtle" forms of persuasion proscribed by the Due Process Clause. Cf. *Connelly*, 479 U. S., at 164.[2]

---

2. Although the coerced confession test comes from due process rather than the Fifth Amendment, there should be little difference between the level of compulsion that violates procedural due process and that which violates the Fifth Amendment. *Brown* was decided before the incorporation of the Fifth Amendment. The fact that due process is still used to analyze involuntary confessions is a "historical accident." *Cooper* v. *Dupnik*, 924 F. 2d 1520, 1529, n. 17 (CA9 1991), rev'd, *Cooper* v. *Dupnik*, 963 F. 2d 1220 (CA9 1992) (en banc).

Without incrimination, there is no procedural due process violation.

B. Due Process and Policy.

Allowing civil damages for violations of the procedural due process voluntariness standard also threatens public safety. Police interrogation is a public good, not a necessary evil. The *Miranda* decision recognized that confessions are a "proper element in law enforcement." *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966). "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Schneckloth*, 412 U. S., at 225. " 'Questioning suspects is indispensable in law enforcement.' " *Culombe* v. *Connecticut*, 367 U. S. 568, 578 (1961) (opinion of Frankfurter, J.).

It is true that the benefit to society is limited to voluntary confessions. Cf. *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991) ("Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . ."). If the line between voluntary and involuntary confessions were clear, then there would be no additional cost to society for adding civil liability to the remedies for failing to adhere to the voluntariness standard. Unfortunately, the voluntariness test is far from clear.

"The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw . . . ." *Haynes*, 373 U. S., at 515. Dissatisfaction with applying the voluntariness test was a motivation behind *Miranda*'s comparatively bright-line rule. See *Michigan* v. *Mosley*, 423 U. S. 96, 113 (1975) (Brennan, J.,

dissenting); Stone, The *Miranda* Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99, 102-104. One reason for the *Miranda* rule is that it provides at least a "brighter-line" rule than the due process standard. See *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993).

A myriad of objective and subjective factors governs the voluntariness inquiry. "Those potential circumstances include not only the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." *Id.*, at 693 (citations omitted). This "exhaustive totality-of-circumstances approach," see *id.*, at 694, is further complicated by the elusive concept of voluntariness.

> "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." Bator & Vorenberg, Arrest, Detention, Interrogation, and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Colum. L. Rev. 62, 72-73 (1966).

Therefore, the due process standard has been rightly criticized as giving too little guidance to the police. See Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 869 (1991). The inherent subjectivity of determining when the suspect's "will was overborne," *Schneckloth*, 412 U. S., at 226, further complicates the inquiry. Determining one's will is inherently subjective. Thus factors such as the suspect's education, intelligence, or adaptation to the stress of incarceration influence the admissibility of the confession under the

voluntariness standard. See *Fulminante*, 499 U. S., at 286, n. 2. This means that interrogation that is acceptable in some contexts can render the confession inadmissible due to certain characteristics of the suspect, which further complicates an already muddled issue.

This Court has recognized the considerable criticism of the voluntariness standard. See *Miller*, 474 U. S., at 116, n. 4. The complexity of this standard was a substantial reason to not apply the rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to *Miranda*. Precluding *Miranda* claims from federal habeas corpus would not lessen the workload of the federal courts, because the *Miranda* inquiry would be replaced by the considerably more complex voluntariness issue. See *Withrow*, 507 U. S., at 693-694.

The threat of civil litigation can deter public employees from exercising their duties properly. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982). While the qualified immunity defense is predicated upon providing government officials with an objective standard of liability, see *Wyatt* v. *Cole*, 504 U. S. 158, 166 (1992), the vagueness and subjectivity of the voluntariness standard threatens to overwhelm this defense.

Many confessions can be deemed involuntary yet not the product of particularly "coercive" interrogation, as that term is commonly understood. Promises by the interrogator can lead to a confession being declared involuntary. Thus courts have struck down confessions made in response to promises of "nonprosecution, the dropping of some charges, medical treatment, or a certain reduction in the punishment defendant may receive . . . ." See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.2(c), pp. 453-454 (2d ed. 1999) (footnotes omitted). For example, one court struck down a confession induced by a promise to help the defendant get counseling after confessing. See *People* v. *Shaw*, 180 Ill. App. 3d 1091, 1094-1096, 536 N. E. 2d 849, 851-852 (1989). This Court has struck down a confession induced by a promise from a police informant to protect the defendant from

his fellow prisoners, an admittedly "close question." See *Fulminante*, 499 U. S., at 287. It has also struck down a confession induced by a promise to a suspect in custody that he would be allowed to call his wife after confessing. See *Haynes*, 373 U. S., at 514. These cases illustrate that a confession can be involuntary even if there is little actual coercion or official misconduct. Civil liability should rest on sterner stuff.

The present case highlights the problems with the voluntariness standard. *Mincey* v. *Arizona*, 437 U. S. 385 (1978), the closest case, is distinguishable on several grounds. Mincey repeatedly asked for counsel, and the interrogation lasted continuously from 8:00 p.m. until midnight. The interview of Martinez took only around 45 minutes. See Pet. for Cert. 3. Martinez never asked for counsel, but only indicated twice that he would not answer any questions until he was treated. See *supra*, at 2.

The most important difference is that Martinez was never "compelled in any criminal case to be a witness against himself." Cf. U. S. Const., Amdt. 5. While Mincey's interview was used to impeach his testimony at his criminal trial, see 437 U. S., at 397, Martinez has not been prosecuted. See *supra*, at 2. Sergeant Chavez thought that Martinez was going to die. See Pet. for Cert. 3. If he had been right, then the interview would have been the only way to get Martinez's side of the story. The only ones who might have been threatened by the interview were the officers involved in the shooting. While Martinez lived to tell his story, this does not change the nature of the interview. *Miranda* would have prevented Martinez's statements from being used against him, but it would not have prevented any of his statements from being used for or against Officers Peña or Salinas in subsequent disciplinary, civil, or criminal proceedings. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317 (1976) (no Fifth Amendment violation without criminal prosecution). Allowing this comparatively benign interrogation to support civil liability threatens to straightjacket the police in the interrogation room.

The voluntariness standard in this case provided weak cover for finding civil liability for questioning contrary to *Miranda*. The vagueness of the procedural due process standard means that this will be repeated unless courts are foreclosed from basing civil liability upon questioning contrary to this procedural due process standard. While grossly improper interrogation can support civil liability, a more concrete standard and a greater level of harm are needed.

C. Alternatives.

Something more serious than a violation of the procedural due process voluntariness standard is needed to support civil liability for an interrogation.

> "Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails." *Buckley* v. *Fitzsimmons*, 919 F. 2d 1230, 1244 (CA7 1990), rev'd on other grounds, *Buckley* v. *Fitzsimmons*, 509 U. S. 259 (1993).

This passage from the Seventh Circuit's opinion is taken in the context of allowing prosecutors absolute immunity for Fifth Amendment or *Miranda* violations because they involve trial rights. See 919 F. 2d, at 1244. It also asserts that coercive interrogation would only be afforded qualified immunity. See *ibid*. However, not every act of "coercion" involves pretrial harm to the suspect. Civil liability should be limited to gross coercions like those listed in the *Buckley* passage, but not the more subtle forms of coercion that also fall within the procedural due process standard.

Interrogators should be held liable under 42 U. S. C. § 1983 for violence, the deprivation of food, water, sleep, or other life necessities or threats to commit such wrongs against the suspect. This approach has several related advantages over the

voluntariness standard. First, it limits liability to clearly identifiable harms that are complete without regard to the admissibility of evidence. It also provides an objective standard that is much easier to understand than the murky voluntariness test. Finally, under this standard there is no real risk of deterring worthwhile, legal interrogation. Violence and deprivation, whether real or threatened, have no place in the interrogation room. More subtle forms of psychological pressure can produce constitutionally valid confessions in the right context. See *supra*, at 24-25.

This Court has once invoked due process to regulate interrogation through criminal sanctions on the interrogating officers. In *Williams* v. *United States*, *supra*, the Court held that officers who beat a confession out of a suspect could be prosecuted for violating the suspect's due process rights under the predecessor of 18 U. S. C. § 242. See 341 U. S., at 101-102. However, not every interrogation that resulted in an involuntary confession would necessarily lead to criminal sanction. "Some day the application of [18 U. S. C. § 242] to less obvious methods of coercion may be presented and doubts to the adequacy of the standard of guilt may be presented."[3] *Ibid.* In *Williams*, the suspects' interrogation consisted of brutal beatings and other forms of physical abuse. *Id.*, at 98-99. "Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys." *Id.*, at 101-102 (emphasis added).

This distinction has constitutional significance. Force, the threat of force, or the deprivation of food, water, or sleep during interrogation violates substantive due process. Unlike the procedural due process prohibition against the use of coerced

3. The standard of clarity of pre-existing law for finding civil liability under 42 U. S. C. § 1983 is the same as for finding criminal liability under 18 U. S. C. § 242. *United States* v. *Lanier*, 520 U. S. 259, 270-271 (1997).

confessions, this right is violated without regard to whether the suspect is in fact incriminated. The violation is complete with the beatings.

The Seventh Circuit's decision in *Buckley* has been characterized as a substantive due process holding. See Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417, 451-452 (1994). This Court has recognized that the use of force by government officials that "shocks the conscience" violates substantive due process. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998). Like any standard, this test can be misapplied. See Klein, *supra*, at 454; Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1307 (1993) (criticizing the substantive due process holding of *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1237 (CA9 1992) (en banc)). A properly calibrated standard as suggested by the Seventh Circuit's holding in *Buckley* provides adequate protection and an appropriately concrete standard.

The *Buckley* standard is also consistent with *Lewis*. The *Lewis* Court noted that the intentional infliction of harm is much more likely to shock the conscience than negligent or reckless harm. See 523 U. S., at 849. An interrogation practice that violates substantive due process will involve an intentional violation of the right, like a beating. Therefore there should be no difficulty in finding the conduct shocking to the court's conscience under the appropriate standard.

While other constitutional standards are available, they are wanting. This Court has left open the question of whether the Fourth Amendment's prohibition of unreasonable seizures applies to detainees after the arrest has been completed. See *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989). Extending the Fourth Amendment to pretrial detainees raises difficult questions, see *United States* v. *Cobb*, 905 F. 2d 784, 788, n. 7 (CA4 1990), that need not be answered in this case. *Graham* also mentioned that pretrial detainees had a due process right to

be free "from the use of excessive force that amounts to punishment." See 490 U. S., at 395, n. 10 (citing *Bell* v. *Wolfish*, 441 U. S. 520, 535-539 (1979)). Interrogation and prisoner rights are separate issues that should not be mixed. The substantive due process standard of *Buckley* does not need to be supplemented by *Bell*'s foreign standard.

The fact that a federal appellate court has allowed a § 1983 action for Sergeant Chavez's brief, comparatively benign questioning demonstrates the need to clarify the law. This Court should limit § 1983 liability for interrogation to the gross violation that leads to real harm other than the suspect's incriminating statement. Limiting money damages to physical harm, threats of harm, or substantial deprivations will afford suspects appropriate compensation, while limiting unwarranted assaults on police practices.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

September, 2002

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation